INDEX

	Page
Statement of the basis of jurisdiction of the United States Supreme Court to review an appeal	1
(1) Statutory provision sustaining jurisdiction	1
(2) New Hampshire statute involved	1
(3) Judgment sought to be reviewed	3
(4) The case, the raising of federal questions, and the rulings herein brought the case within the jurisdictional requirements	3
(5) Decisions of this Court bringing this case within the jurisdictional provisions	6
(6) Federal questions raised	7
(7) Conclusion	13
Opinion of the Supreme Court of New Hampshire	14

CITATIONS

Cases:

Associated Press et al. v. *N. L. R. B.*, 301 U. S. 103 (1937)	10, 11
Associated Press v. *U. S.*, 326 U. S. 1 (1945)	10, 11
Cincinnati, Portsmouth, Big Sandy and Pomeroy Packet Co. v. *Bay*, 200 U. S. 179 (1906)	6
Grosjean v. *American Press Co., Inc.*, 297 U. S. 233 (1936)	9, 10
Lovell v. *City of Griffin, Ga.*, 303 U. S. 444 (1938)	7
Market St. Ry. Co. v. *Railroad Commission of State of California et al.*, 324 U. S. 548 (1945)	7
Nashville, C. & St. L. Ry. v. *Wallace*, 288 U. S. 249 (1933)	7
Nebbia v. *New York*, 291 U. S. 502 (1934)	7
Olsen v. *State of Nebraska*, 313 U. S. 236 (1941)	7
Queenside Hills Realty Co., Inc. v. *Saxl*, — U. S. —, 66 Sup. Ct. 850 (1946)	13
Senn v. *Tile Layers Protective Union, Local No. 5 et al.*, 301 U. S. 468 (1937)	7

Page

Skinner v. *State of Oklahoma*, 316 U. S. 535 (1942) . . 12
W. Virginia State Board of Education et al. v. *Barnett et al.*, 319 U. S. 624 (1943) 12

Statutes:

Chapter 185 of the New Hampshire Session Laws of 1945 . . . . . 1, 2
Section 237 of the Judicial Code of the United States . 1

BLEED THROUGH = POOR COPY

THE STATE OF NEW HAMPSHIRE SUPREME COURT

No. 780

THE CHRONICLE & GAZETTE PUBLISHING CO., INC.,

vs.

ATTORNEY GENERAL ET AL

STATEMENT OF THE BASIS OF JURISDICTION OF THE UNITED STATES SUPREME COURT TO REVIEW ON APPEAL.

Pursuant to Rule 12 of the Rules of the Supreme Court of the United States, the appellant files this, its statement of the basis upon which it claims that the Supreme Court of the United States has jurisdiction to review the judgment of this Court.

(1) The statutory provision which sustains the jurisdiction of the Supreme Court of the United States, is Section 237 of the Judicial Code, also known as U. S. C., Title 28, Section 344.

(2) The statute of the State of New Hampshire the validity of which is involved is known as "An Act Relating to Political Advertising" and is Chapter 185 of the Session Laws of 1945 found at page 264 of the publication

"New Hampshire Public Acts and Joint Resolutions of the Legislature of 1945 and Special Session of 1944."

The said Chapter 185 amends Chapter 42 of the Revised Laws of the State of New Hampshire by providing as follows:

"1. Political Advertising. Amend section 6, chapter 42 of the Revised Laws, by striking out said section and inserting in place thereof the following: 6. Political Advertising. No person shall publish, or cause to be published, in a newspaper or other periodical any paid matter which is designed or tends to aid, injure or defeat any candidate for public office, or a constitutional amendment, or any other question submitted to the voters, unless the name of the chairman or secretary, or the names of two officers of the political or other organization inserting the same, or the name of some voter who is responsible therefor, with his residence and the street and number thereof, if any, appear in the nature of a signature. Such matter inserted in reading columns shall be marked at the beginning thereof in a distinctive type "Political Advertisement." No person or corporation, within this state, operating a radio station or network of stations shall broadcast any such paid political matter without first announcing the person or committee paying therefor. Any person who violates, or in any way knowingly aids, or abets the violation of, any provision of this section shall be fined not more than one hundred dollars, or imprisoned not more than sixty days.

"2. Maximum Charges for Political Advertising. Amend section 9, chapter 42 of the Revised laws by striking out said section and inserting in place thereof the following: 9. Payments for Publication. No person or corporation, within the state, publishing a newspaper or other periodical or operating a radio station or network of stations shall receive for political advertising or for political broadcasts, a rate in excess of the rate or rates regularly charged by such person or corporation for commercial advertising or for com-

BLEED THROUGH – POOR COPY

mercial broadcasts of similar character and classification and no candidate or political committee shall pay for political advertising or broadcasts any rate or charge in excess of such rate or rates regularly charged.

"3. Filing of Rates. Amend chapter 42 of the Revised Laws by inserting after section 9 the following new section: 9-a Rates to be Filed. Every person or corporation, within this state, publishing a newspaper or other periodical, or operating a radio station or network of stations, shall file with the secretary of state for public inspection a schedule or schedules showing the rates for commercial advertising and commercial broadcasts. Any such schedule may be changed or amended by filing a new or amended schedule with the secretary of state, but such new or amended rates shall not be effective until thirty days after filing.

"4. Takes Effect. This act shall take effect upon its passage.

(Approved May 18, 1945.)"

(3) The judgment sought to be reviewed is dated September 3, 1946, being a decision denying a petition for a rehearing of a judgment previously entered on June 27, 1946; and the date upon which the application for appeal from the judgment of September 3, 1946, was presented is the Fourth day of November, 1946.

(4) The case, the raising of Federal questions, and the rulings herein were of a nature hereinafter set forth, being such as to bring the case within the jurisdictional requirements hereinbefore set forth:

(a) The appellant filed in the April, 1946, Term of the Superior Court of Rockingham County, State of New Hampshire a Petition for Declaratory Judgment to determine its rights under Chapter 185, Session Laws of 1945. In paragraph 18 thereof (pages 5 and 6) it was requested:

"(18) That in the alternative and/or in the event that the court should determine and adjudicate that

said Petitioner is not entitled to charge its published political rate and that the charging and receiving of same for political advertising is in violation of the provisions of Section 2 of said Chapter 185, said Petitioner respectfully requests said court to render a declaratory judgment, adjudging and decreeing:

(a) That Section 2 of Chapter 185 of the Session Laws of 1945 is unconstitutional and void because:

(1) It impairs the Petitioner's right of freedom of contract;

(2) It does not state or set forth an ascertainable standard of guilt with such explicit definition that the law abiding may avoid prosecution and final protection;

(3) It is an abridgment of the right of freedom of the press guaranteed in Article 22 of the Constitution of the State of New Hampshire and violates the Constitution of the United States;

(4) It is regulatory and discriminatory and thus violative of the equal protection of the laws guaranteed in Article 10 of the Constitution of the State of New Hampshire and Constitution of the United States;

(5) That commercial advertising does not carry with it the risk of libel that a political advertisement does;

(6) That the risk involved in the publication of ordinary commercial advertising is much less than that involved in political advertising;

(7) That said section wholly supplants the right of private contract relating to the rates to be charged for political advertisements;

(8) That a consideration of the public health, safety, morals or general welfare does not authorize the Legislature, under the guise of exercising the police power, to deprive parties of the right to voluntarily contract concerning such ordinary and everyday affairs of life as the printing of political advertisements;

BLEED THROUGH – POOR COPY

(9) That said Chapter 185 deprives the Petitioner of its property without due process of law;

(10) That the Petitioner as the owner and publisher of a newspaper is not in the same classification or category as a public utility and is therefore not subject to governmental control and supervision as to the reasonableness of its advertising rates;

(11) That the statute is unreasonable, regulatory and discriminatory in that it attempts to impose restrictions on publishers of newspapers or other periodicals or operators of radio stations, and does not regulate or attempt to regulate various and numerous other forms and methods of political advertising, thus creating a privilege for such other advertisers and penalizing publishers of newspapers and radio stations.

(12) That it is an unwarranted, unjustifiable, illegal and unconstitutional attempt to limit the circulation of information to which the public is entitled."

(b) The questions of law raised by the appellant's petition were reserved and transferred to the Supreme Court of New Hampshire without ruling on May 8, 1946, by Stephen N. Wheeler, Presiding Justice of the said Superior Court of Rockingham County, State of New Hampshire (see: Reserved Case —— —— p. 1).

(c) The Supreme Court of the State of New Hampshire rendered a decision on June 27, 1946, declaring Ch. 185 of the Session Laws of New Hampshire to be constitutional. The decision and opinion (a copy of which is annexed hereto) is not yet officially reported but can be found in 48 A(2) 478. In its opinion the Court dealt specifically with the following questions: whether the statute in question was arbitrary and lacked a rational basis in establishing maximum rates (48 A(2) 478, 480), whether it was an invalid encroachment on the freedom of contract (48 A(2) 478, 48112), whether it abridged the liberty of the press (48 A(2) 478, 481), and whether it was discriminatory

and denied the equal protection of the laws (48 A(2) 478, 481). After considering these questions the Court found the statute constitutional.

(d) In the September Term, 1946, of the Supreme Court of the State of New Hampshire, the appellant filed in the said Court a Motion for Rehearing with a Brief in support thereof again attacking the constitutionality of Chapter 185 of the Session Laws of 1945, under the Fourteenth Amendment to the Constitution of the United States.

(e) On September 3, 1946, the Supreme Court of the State of New Hampshire denied the appellant's Motion for a Rehearing.

(f) In the October Term, 1946, of the Supreme Court of the State of New Hampshire the Honorable Thomas L. Marble, Chief Justice of the said Court, signed a certificate to the effect that by its original petition and its motion for a rehearing the appellant had raised Federal questions, attacking the constitutionality of the said Chapter 185, Session Laws of 1945 on the ground that it violated the freedom of the press, the freedom of contract, and that it deprived the appellant of its property, without due process of law, in violation of the 14th Amendment to the Constitution of the United States; and the said certificate further stated that the Supreme Court of the State of New Hampshire, being the highest court in the said state in which a decision on the said Federal questions could be had, had considered the said questions on their merits and had decided that the said Statute was not repugnant to the 14th Amendment to the Constitution of the United States.

(5) The following decisions of this Court are believed to bring the case within the jurisdictional provisions relied on:

Cincinnati, Portsmouth, Big Sandy and Pomeroy Packet Co. v. *Bay*, 200 U. S. 179 (1906);

BLEED THROUGH – POOR COPY

Nashville, C. & St. L. Ry. v. Wallace, 288 U. S. 249 (1933);

Senn v. *Tile Layers Protective Union, Local No. 5 et al.*, 301 U. S. 468 (1937);

Lovell v. *City of Griffin, Ga.*, 303 U. S. 444 (1938);

Market St. Ry. Co. v. *Railroad Commission of State of California et al.*, 324 U. S. 548 (1945).

(6) The Federal questions raised by the appellant as hereinbefore described are substantial on the following grounds:

(a) Chapter 185 of the Session Laws of 1945 obviously attempts to control the price which may be charged by newspapers for political advertising. It was upheld by the Supreme Court of New Hampshire which sustained its position by merely citing *Nebbia* v. *New York*, 291 U. S. 502 (1934), and *Olsen* v. *State of Nebraska*, 313 U. S. 236 (1941) to prove that price control is not necessarily an invalid governmental interference with contract and property rights merely because it is imposed on a business outside of that class which was traditionally described as businesses "affected with a public interest." The Court ignored, however, the criteria set up for price control legislation in the *Nebbia* case: "the law shall not be unreasonable, arbitrary, or capricious," and "the means selected shall have a real and substantial relation to the object sought to be attained" (291 U. S. 502, 525-6).

It is the appellant's contention that the application of these tests to the Statute in question proves its unconstitutionality. The objective of the legislation purports to be the fostering of fair and equal elections. But there is no obvious relation between the price charged for political advertising and the announced objective. There is no conceivable reasonable basis for asserting that the rate set

for political advertising affects the right to cast a vote or the manner in which votes are cast. No relation between the statute and the announced objection is spelled out by the Supreme Court of New Hampshire. In the absence of a reasonable relationship between the statute and the general objective, the legislation is void under the first test laid down by the *Nebbia* case.

The second test suggested by that decision is that the Act in question be free from arbitrariness and capriciousness. Whether the maximum rate is set capriciously and arbitrarily is difficult to determine without knowing the supposed relationship between the Act and the alleged objective. However, the maximum rate should be set in a manner which at least tends to leave a fair return to the business whose property and contracts are being regulated. The statutory scheme in question for drawing the line between exorbitant and non-exorbitant charges or between a fair and unfair return is obviously arbitrary. Connecting the price of political advertising for each newspaper to the commercial rate it charges neither tends to prevent exorbitance nor to guarantee a fair return. There is no reasonable foundation for assuming that rates charged for commercial advertising are not exorbitant or that they guarantee at least a fair return to publishers. To tie political rates to commercial rates is not a reasonable way to determine a political rate which is not excessive and which tends to assure the publisher of at least a fair return. Those publishers who, for some reason, are able to set exorbitant commercial rates are permitted also to set high political rates. Those who are unfortunate enough to receive less than a fair return on commercial advertising are burdened with the same disadvantage so far as political rates are concerned.

The arbitrary nature of the rate regulation is enhanced

BLEED THROUGH – POOR COPY

when one considers the fact that the cost factors entering into the fixing of prices for advertising are entirely different in political advertising than in commercial. The former type of advertising subjects the publisher to the risk of liability for defamation and criminal liability for failure to label the advertising as political. Political advertising is temporary and seasonal so to speak. Defaults in payments by political advertisers are understandably much higher than those by commercial advertisers. No counterbalancing considerations can be imagined or have been suggested which make commercial advertising more onerous than political. Because of the important price factors indicating that political advertising should bring a greater return than commercial, the relationship of the maximum rate which can be charged for it to that set voluntarily for commercial advertising is obviously an arbitrary and capricious method of price regulation.

In short, the Supreme Court of New Hampshire has relied strongly on the *Nebbia* and *Olsen* cases, but it has failed to apply the limiting tests set out in the *Nebbia* decision. The testing of the Act in question by those criteria presents substantial Federal questions. Because the *Nebbia* and *Olsen* cases have only in comparatively recent times created the possibility of price control in fields outside the traditional businesses affected with public interest there has been little opportunity for judicial application of the qualifying tests laid down therein. There has been no decisions clearly indicating an answer to the Federal questions raised herein concerning the regulating of the property and the contracts of the appellant.

(b) The appellant has raised the Federal question as to whether the Act in question violates the freedom of the press. The freedom is guaranteed the plaintiff under the Fourteenth Amendment. *Grosjean* v. *American Press Co.*,

Inc., 297 U. S. 233 (1936). It is the appellant's position that the Statute involved here is directed primarily at restricting the income of newspapers and hence is a violation of the liberty of the press. This argument the Supreme Court of New Hampshire has met by stating first that the freedom in question is not absolute. Admittedly true, this observation advances the argument only a trifle. That Court went on to state that newspapers enjoy no special immunity from the application of laws, citing *Associated Press* v. *N. L. R. B.*, 301 U. S. 103 (1937) and *Associated Press et al.* v. *U. S.* 326 U. S. 1 (1945). This statement is full of qualifications. In *Associated Press* v. *N. L. R. B.* the most pertinent one was stated (301 U. S. 103, 133):

> "The regulation here in question has no relation whatever to the impartial distribution of news. The order of the Board in nowise circumscribes the full freedom and liberty of the petitioner to publish the news as it desires it published or to enforce policies of its own choosing with respect to the writing and rewriting of news * * *"

Improper restrictions on the liberty to publish or to enforce a newspaper's policies with respect to news may be indirect as well as direct. Not all indirect regulation is innocuous. Obviously, since revenue is necessary to the very existence of a newspaper, a newspaper is peculiarly vulnerable at that point. Restrictions thereon should be scrutinized carefully. As was stated in *Grosjean* v. *American Press Co.*, 297 U. S. 233, 244 (1936) with respect to the restriction tested there:

> "It thus operates as a restraint in a double sense. First, its effect is to curtail the amount of revenue realized from advertising; and, second, its direct tendency is to restrict circulation."

BLEED THROUGH – POOR COPY

As this Court stated in that opinion with respect to taxing advertising (p. 245):

> "This (restraint) is plain enough when we consider that, if it were increased to a high degree, as it could be if valid, * * * it well might result in destroying * * * advertising * * *"

What is true, in this respect, of taxing advertising is also true of regulating the price charged for advertising. It is submitted, therefore, that the restraints imposed by the Statute in question are more serious and onerous than those involved in *Associated Press* v. *N. L. R. B.*, 301 U. S. 103 (1937), and *Associated Press et al.* v. *U. S.*, 326 U. S. 1 (1945), relied on by the Supreme Court of New Hampshire.

Another distinction overlooked by that Court in its reliance on those decisions is that they involved regulations applicable to all businesses. The Act under discussion singles out newspapers and radios for its imposition of price control. Obviously the danger to a free press is greater in a statute directed specifically at it alone than one directed at all businesses.

It is submitted that the price regulation inherent in the act involved here, entails a substantial restraint on the freedom of the press and is especially dangerous since it applies only to newspapers and radios. Furthermore, the restraint on the press is imposed for an ill-defined purpose. Presumably, in some way, it is imposed for the purpose of obtaining fair and equal elections. The extent to which it fosters that purpose, if at all is so negligible that it is not worth the sacrifice made in terms of restraints on the press. The public welfare promoted by this encroachment does not have the significance of that involved in *Associated Press* v. *N. L. R. B.*, *supra* or *Associated Press et al.* v. *U. S.*, *supra*. Because the restraint is substantial, because it is directed only at newspapers and radios and because the

resulting good in terms of better elections is negligible, the plaintiff submits that the Act in question violates the liberty of the press guaranteed by the State and Federal constitutions.

(c) The Supreme Court of New Hampshire relied in its opinion on the doctrine which restricts judicial review of legislative police power action to cases where the Legislature had no conceivable rational basis for adopting the restriction. At least with respect to the claim that the Act violates the freedom of the press, the appellant contends that since *W. Virginia State Board of Education et al.* v. *Barnett et al.*, 319 U. S. 624 (1943), no such limitation exists.

(d) The Supreme Court of New Hampshire has decided that the legislation in question does not deny the appellant its right of the equal protection of the laws, stating that the Legislature is not bound to cover the whole field of possible abuses so long as it regulates the major portion of any given problem. Though this may be true, it is nevertheless necessary that the law cover all similarly situated without invidious discriminations against groups or types. *Skinner* v. *State of Oklahoma*, 316 U. S. 535 (1942).

There is no reasonable basis for assuming that the problem of excessive rates is peculiar to radio and newspaper political advertising and does not exist in advertising in transportation systems, billboards and by job printers, or in assuming that the amount of political advertising done by media other than newspapers and radios is nominal. Nor can it reasonably be assumed that newspapers and radios have for some reason a unique opportunity to demand excessive rates. To classify and discriminate on the basis of the form which the advertising takes is to draw artificial lines and to make invidious discriminations.

BLEED THROUGH – POOR COPY

The Supreme Court of New Hampshire relied on *Queenside Hills Realty Co., Inc.* v. *Saxl*, —— U. S. ——, 66 S. Ct. 850 (1946). But that case is clearly distinguishable since the appellant there objected on the ground that discrimination might result between existing subjects of regulation and similar property which might come into existence in the future. No present existing discrimination was indicated but merely the threat of a development of circumstances in the future under which discrimination might result. The objection here is made to a presently existing discrimination based on artificial lines drawn between various forms which political advertising takes.

(7) It is respectfully submitted that the Supreme Court of the United States has jurisdiction upon appeal to review the decision of the Supreme Court of New Hampshire in the above entitled cause under Section 237 of the Judicial Code, also known as U. S. C., Title 28, Section 344.

STANLEY M. BURNS,
ELISHA HANSON,
Counsel for Appellant.

APPENDIX

Rockingham, June 27, 1946.

No. 3598

THE CHRONICLE & GAZETTE PUBLISHING CO., INC.,

v.

ATTORNEY GENERAL & a

PETITION, for a declaratory judgment (R. L., *c.* 370 *s.* 20), to determine the constitutionality and the applicability to the plaintiff of Laws, 1945, *c.* 185, "An act relating to political advertising," Section 2 of which provides: "No person or corporation, within the state, publishing a newspaper or other periodical or operating a radio station or network of stations shall receive for political advertising or for political broadcasts, a rate in excess of the rate or rates regularly charged by such person or corporation for commercial advertising or for commercial broadcasts of similar character and classification and no candidate or political committee shall pay for political advertising or broadcasts any rate or charge in excess of such rate or rates regularly charged."

The plaintiff publishes the Portsmouth Herald in the City of Portsmouth and "is the publisher of the New Hampshire Gazette, established October 7, 1756, and the oldest newspaper in America." The defendants, other than the Attorney-General, are officials of the Portsmouth City Political Committees who inserted political advertisements in the plaintiff's paper. These defendants paid and the plaintiffs received for these advertisements at the rate of $3.00 per inch. The rates charged by the plaintiff for commercial advertising was $1.50 per inch, local rate, and $2.00 per inch, open rate. Laws, 1945, *c.* 185, *s.* 3, requires a schedule of rates "for commercial advertising" to be filed with the Secretary of State, and the plaintiff filed the three above mentioned rates as his schedule.

BLEED THROUGH – POOR COPY

The questions of law raised by the plaintiff's petition were reserved and transferred without ruling by the Court (*Wheeler*, J.).

Hughes & Burns (*Mr. Walter A. Calderwood* orally), for the plaintiff.

Ernest R. D'Amours, Attorney-General (by brief and orally), *pro se*. (*Gordon M. Tiffany*, Law Assistant, on the brief).

Ralph G. McCarthy, for defendant Durell, filed no brief.

Certain other defendants, *pro se*, filed no briefs.

KENISON, J. A petition for a declaratory judgment is particularly appropriate to determine the constitutionality of a statute when the parties desire and the public need requires a speedy determination of important public interests involved therein. *Tirrell* v. *Johnston*, 86 N. H. 530; *Woolf* v. *Fuller*, 87 N. H. 64; Anderson, Declaratory Judgments (Supp. 1946) 260.

The Constitution of New Hampshire guarantees that the right to elect and be elected shall be free and equal. "All elections ought to be free, and every inhabitant of the State, having the proper qualifications, has equal right to elect, and be elected, into office. * * *" Bill of Rights, Art. 11th. Pursuant to this constitutional mandate the Legislature, at an early date enacted provisions to insure the purity of elections, R. L., *c.* 41. Subsequently there was enacted "An act to prevent corrupt practices at elections, and to regulate expenditures for political purposes and provide for the publicity thereof. Laws, 1915, *c.* 169, which now appears in R. L., *c.* 42. This statute proceeded on the theory that an election was neither free nor equal if it was dishonest. Recent decisions of the Supreme Court of the United States indicate that the theory was valid and the objective constitutionally permissible, *United States* v. *Classic*, 313 U. S. 299; *Smith* v. *Allwright*, 321 U. S. 649.

R. L., *c.* 42 entitled "Political Expenditures, Advertising and Contributions" places maximum limits on political expenditures, provides for publicity thereof, and prohibits other forms of "corrupt practices" in order to make elections free, equal and honest, *Coutremarsh* v. *Metcalf*, 87

N. H. 127, 131, 132. Section 9 of this chapter, prohibited any candidate or committee from paying newspapers any rate for political advertisements in excess of what was regularly charged by such newspaper "for commercial advertising occupying the same space and position and running the same length of time." Violation of this section was considered a corrupt practice under Section 16 of the same chapter. Laws, 1945 *c.* 185, *s.* 2, amended Section 9 by making it equally a corrupt practice for a newspaper to receive a rate "in excess of the rate or rates regularly charged • • • for commercial advertising • • • of similar character and classification. • • •"

In considering the constitutionality of R. L., *c.* 42, *s.* 9, as amended by Laws, 1945, *c.* 185, certain well established doctrines will be applied. First, "It has always been the practice in this jurisdiction to follow the universally accépted doctrine that the constitutionality of an act passed by the coordinate branch of the Government is to be presumed. It will not be declared invalid except on unescapable grounds." *Musgrove* v. *Parker*, 84 N. H. 550, 551. See also *Havens* v. *Attorney-General*, 91 N. H. 115, 121. Secondly, this Court is not to compete with the Legislature in matters of opinion "upon points of right, reason and expediency." *State* v. *Moore*, 91 N. H. 16, 21. Thirdly, "a distinction in legislation is not arbitrary, if any state of facts reasonably can be conceived that will sustain it, and the existence of that state of facts at the time the law was enacted must be assumed." *State* v. *Moore*, supra 22.

Counsel have not cited and research has not disclosed any case "on all fours." It is contended that the statute is arbitrary and lacks a rational basis in establishing the commercial advertising rate as a maximum rate for political advertising. In the absence of any case in point, we turn to laws elsewhere to determine if this statute is unique. A random selection indicates that the rates for political advertising in newspapers or by radio stations are limited by various methods and standards. Utah prohibits a political advertising rate which exceeds "the regular rate charged by newspapers." Utah Code Anno. (1943) 25: 13-27. Mississippi confines political advertising rates to the "usual

BLEED THROUGH – POOR COPY

and ordinary rate." Miss. Code Anno. (1942) *s.* 3176. Texas prohibits such rates in excess of "regular advertising rates." Vernon's Texas Statutes (1936) Penal Code Art. 211. North Dakota provides that "no newspapers in the state shall charge more than the legal rates for the publication of legal notices." N. D. Code (1943) 46-0505. Minnesota confines political advertising rates to "regular advertising rates," or requires a statement of the amount paid in dollars and cents. Minn. Statutes (1941) *ss.* 211.03, 211.05. The constitutionality of these statutes appear to have been unchallenged or assumed. *Engelbert* v. *Tuttle,* 185, Minn. 608.

The Statutes cited above prove that various states regulate political advertising and that the standard for a maximum or uniform rate is notd issimilar to that employed by our statute. "Laws expressly relating to political advertising have been found in more than four-fifths of the states. A survey of legislation in this category reveals that it is predominately regulatory in character." Roper, *State Advertising Legislation* (U. S. Dept. of Commerce, 1945) 14.

It is argued that the statute is discriminatory as applied to newspapers since it does not regulate political advertising by and in automotive equipment, aircraft and transportation systems, nor such advertising by job printers or billboard advertisers. It is sufficient answer to this argument that "the state is not bound to cover the whole field of possible abuses." *Welch Co.* v. *State,* 89 N. H. 428, 432. So far as we know the Legislature may have concluded that political advertising in aircraft and transportation systems and other similar mediums was not so extensive or presented the problems involved in newspaper and radio advertising. The proposition that the Legislature must regulate all or none is not accepted. We do not know the factual considerations upon which the Legislature made its determination but it is not to be assumed to be unreasonable if it can be supported on any reasonable basis. Merely because some political advertising might be done by a peripatetic popcorn vendor or some other transportation medium, human or mechanical, does not make the statute discriminatory.

Insofar as advertising by job printers and billboard advertisers is concerned, the Legislature may well have deter-

mined either that the regulation was not needed or the evils therein could not be regulated in the same manner as newspapers and radio stations. In short, the Legislature may regulate the major portion of any given problem within its police power without being required in so doing to control other minor and collateral evils connected therewith. "The Legislature is entitled to hit the evil that exists." *Queenside Hills Realty Co.* v. *Saxl*, 66 S. Ct. 850, 852, (April 22, 1946). So far as it is disclosed from the record or can be ascertained by judicial notice, the Legislature had a reasonable basis for including newspapers and radio stations and excluding other advertising media in its regulation of political advertising. Any contrary conclusion is entirely without support in this record. We cannot say that the statute is arbitrary, discriminatory or lacking a rational basis.

Plaintiff's right of freedom of contract is not unconstitutionally invaded by this legislation. *Commonwealth* v. *Boston Transcript Co.*, 249 Mass. 477, which held unconstitutional a statute compelling a newspaper to publish findings of the Minimum Wage Commission at regular rates, is clearly distinguishable. The present statute does not compel the plaintiff or any other newspaper to accept political advertising. It provides that if such advertising is accepted, the rate shall be the same as commercial rates. There is no special immunity to newspapers from the application of general laws. *Associated Press* v. *National Labor Relations Board*, 301 U. S. 103.

It cannot be successfully argued that freedom of the press is abridged. We do not have here a statute imposing a license tax on newspapers as in *Grosjean* v. *American Press Co.*, 297 U. S. 233. Neither does the statute suppress or censor newspapers as was attempted in *Near* v. *Minnesota*, 288 U. S. 697. The statute does not directly or indirectly exercise any previous restraint on the publication of news by newspapers. Freedom of the press is not an absolute right. *State* v. *Chaplinsky*, 91 N. H. 310, 317. *Giragi* v. *Moore*, 301 U. S. 670.

Concededly the plaintiff is not a public utility so that its rates may be regulated generally and therefore it cannot be compelled to accept political advertising. 87 A. L. R. 979.

BLEED THROUGH – POOR COPY

But it does not follow that because newspapers are not public utilities that they are immune from regulation. Newspapers, like other businesses, are subject to the police power. The view which once prevailed that a business is not subject to regulation unless affected with a public interest was considerably impaired in *Nebbia* v. *New York*, 291 U. S. 502 and was discarded in *Olsen* v. *State of Nebraska*, 313 U. S. 236. It is not necessary to consider the extent to which such regulation may go but so long as it does not involve suppression or censorship, the regulation of newspapers is as broad as that over other private business. *Associated Press* v. *United States*, 326 U. S. 1; Thayer, *Legal Control of the Press* (1944) Chap. 15.

The validity of the statute is attacked on the grounds that it does not set up an ascertainable standard of guilt. We conclude that the statute is as certain and definite as others heretofore upheld as constitutionally permissible. See, *United States* v. *Murzbach*, 280 U. S. 396, where the statute prohibited contributions for "any political purpose whatsoever." The statute is as definite as the words, "offensive," "derisive," and "annoying," which were involved in *State* v. *Chaplinsky*, 91 N. H. 310, affirmed 315 U. S. 568.

Although it is not necessary to support the conclusion in this case on historical grounds (cf. Attorney-General v. Morin, 93 N. H. 40), it may be noted that for more than a century the New Hampshire Legislature has regulated certain aspects of advertising. The Act of July 7, 1826, provided the amount of compensation that the New Hampshire Gazette was to receive for printing acts and journals of the Legislature in its paper. Laws of N. H., Vol. 10 *c.* 7. Laws, 1869, *c.* 1, *s.* 9, regulated advertising as follows: "If any advertising other than the laws of each session shall be ordered into any newspaper, the compensation therefor shall be the same as is usually paid by individuals for the same character and amount of matter in the same paper." Political advertising has been the subject of regulation for many years. Laws, 1911, *c.* 106; Laws 1915, *c.* 169.

It is concluded that the Legislature has the authority to regulate the abuse of political advertising as a corrupt prac-

tice. 69 A. L. R. 377; *Commonwealth* v. *Evans*, (Pa.) 40 A. (2d) 137, 139.

The plaintiff's rate for political advertising was in excess of any rate for any kind of commercial advertising and is prohibited by the statute. The plaintiff cannot avoid the statute by filing a higher political rate of three dollars per inch under a commercial rate of one dollar and a half or two dollars per inch. The plaintiff is subject to the provisions of Laws, 1945, *c.* 185.

Case discharged.

Marble, C. J., and Johnston, J., dissented: the others concurred.

Marble, C. J., dissenting: The legislative power to fix the rates which a business enterprise may charge is restricted to businesses clothed with a public interest or to commercial activities which concern the public health, safety, morals, or general welfare. See Cooley, Constitutional Limitations (7th *ed.*), 870-877; Black, Constitutional Law (3d *ed.*), 412-414; *Opinion of the Justices*, 88 N. H. 497-499.

The State cannot by mere legislative fiat convert a private business into a public utility (*Producers &c. Co.* v. *Commission*, 251 U. S. 228, 230, 231; 43 Am. Jur. 574), and it is generally held that the publication and sale of newspapers is a private enterprise not affected with a public interest. *Journal &c. Co.* v. *Company*, 286 Fed. 111, 113; *In re Wohl*, 50 Fed. (2d) 254, 257; *Shuck* v. *Herald*, 215 Iowa 1276, 1281; *Commonwealth* v. *Company*, 249 Mass. 477; *Philadelphia Record Co.* v. *Company*, 305 Pa. 372; *Mack* v. *Costello*, 32 S. D. 511. See, also, Snyder, "Freedom of the Press—Personal Liberty or Personal Property," 20 B. U. Law Rev. 1, 21.

"Under our form of government the use of property and the making of contracts are normally matters of private and not of public concern. The general rule is that both shall be free of governmental interference. But neither property rights nor contract rights are absolute; * * * a state is free to adopt whatever economic policy may reasonably be deemed to promote public welfare, and to enforce that

BLEED THROUGH – POOR COPY

policy by legislation adapted to its purpose." *Nebbia* v. *New York*, 291 U. S. 502, 523.

If, however, that legislation bears no substantial relation to a proper legislative purpose or is either arbitrary or discriminatory, it contravenes both the Fifth and the Fourteenth Amendments to the Federal Constitution as well as Articles 2 and 12 of our own Bill of Rights. *Opinion of the Justices*, 86 N. H. 597, 598; *Woolf* v. *Fuller*, 87 N. H. 64, 68; *State* v. *Paille*, 90 N. H. 347, 352; *State* v. *Moore*, 91 N. H. 16, 22; and cases cited.

Section 9, as originally enacted, was section 10 of chapter 169 of the Laws of 1915, entitled "An act to prevent corrupt practices at elections and to regulate expenditures for political purposes and provide for the publicity thereof." The section merely limited the sum which any candidate for public office might pay for newspaper advertising, but did not seek (as does Laws 1945, *c.* 185, *s.* 2) to limit the rates which a newspaper may charge.

A corrupt act is an act done with an intent to give some advantage inconsistent with official duty and the rights of others. It includes bribery, but is more comprehensive. Bouvier's Law Dictionary (Baldwin's Century *ed.*), *p.* 239. There is much which indicates that the real purpose of chapter 185 is to secure to candidates an economical means of advertising rather than to guard against the remote chance that a candidate may "bribe" a newspaper proprietor to reject all political advertising except his own. The doubt on this subject need not be resolved, however, for, even if it be conceded that chapter 185 bears some relation to the prevention of corrupt practices, the statute must be held invalid because of its arbitrary features.

Judicial notice may properly be taken of the fact that political advertising, though extensive, is temporary. Moreover, the statute affords no protection to publishers of political advertisements against liability for libelous statements contained therein (see *Commonwealth* v. *Company*, 249 Mass. 477, 482), and the editorial scrutiny of "copy" submitted by a candidate for office, in order to insure its freedom from defamatory matter, may entail more labor

than that required in the case of ordinary commercial advertisements.

The statute prescribes no method for determining whether the commercial rate it arbitrarily fixes as adequate for the service rendered political advertisers is reasonable. There is no presumption that it is. *Sharon Herald Co.* v. *County*, 132 Pa. Superior Ct. 245, 251. See *Commonwealth* v. *Company, supra.*

JOHNSTON, J., concurred in the foregoing opinion.



INDEX

	Page
I. A substantial Federal question was raised by the appellant's original petition	1
A. The Federal questions sought to be reviewed here were specifically raised in the appellant's original petition	1
B. The Federal questions raised by the appellant in its petition for a declaratory judgment were recognized and decided by the Supreme Court of New Hampshire	5
II. The appellant also properly raised the Federal question by filing a petition for rehearing	7
III. Conclusion	9

CITATIONS

Cases:

Chronicle & Gazette Publishing Co., Inc. v. *Attorney General*, 94 N. H. —, 48 Atl. (2d) 478	5, 6
Cincinnati, Portsmouth, Big Sandy and Pomeroy Pocket Co. v. *Bay*, 200 U. S. 179, 50 L. Ed. 428, 26 Sup. Ct. 208 (1906)	9
Herndon v. *Georgia*, 295 U. S. 441, 79 L. Ed. 1530 (1935), 55 Sup. Ct. 794 (1935)	4, 8
Maxwell v. *Newbold*, 18 How. 511, 15 L. Ed. 506 (1855)	3
Messenger v. *Mason*, 10 Wall. 507, 19 L. Ed. 1028 (1870)	4

Statutes:

Chapter 185 of the New Hampshire Session Laws of 1945	5
Section 237 of the Judicial Code of the United States	9

BLEED THROUGH – POOR COPY

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

No. 780

THE CHRONICLE & GAZETTE PUBLISHING CO., INC.,

Appellant,

vs.

ATTORNEY GENERAL, ET AL.

Appellees

APPEAL FROM THE SUPREME COURT OF THE STATE OF NEW HAMPSHIRE

SUPPLEMENTAL STATEMENT OF JURISDICTION IN REPLY TO THE APPELLEE'S STATEMENT OPPOSING JURISDICTION.

I. A Substantial Federal Question Was Raised by the Appellant's Original Petition

A. *The federal questions sought to be reviewed here were specifically raised in the appellant's original petition.*

The present controversy was initiated when the appellant herein filed a petition for a declaratory judgment in the Superior Court of Rockingham County, State of New

Hampshire (Record p. ——). In paragraph 17 of the petition, it was requested that a declaratory judgment be entered decreeing, among other things, that Section 2 of Chapter 185 of the Session Laws of 1945 is unconstitutional because:

"(1) It impairs the Petitioner's right of freedom of contract;

". . . . . .

"(3) It is an abridgment of the right of freedom of the press guaranteed in Article 22 of the Constitution of the State of New Hampshire and violates the Constitution of the United States;

"(4) It is regulatory and discriminatory and thus violative of the equal protection of the laws guaranteed in Article 10 of the Constitution of the State of New Hampshire and Constitution of the United States;

". . . . . .

"(7) That said section wholly supplants the right of private contract relating to the rates to be charged for political advertisements;

"(8) That a consideration of the public health, safety, morals or general welfare does not authorize the Legislature, under the guise of exercising the police power, to deprive parties of the right to voluntarily contract concerning such ordinary and everyday affairs of life as the printing of political advertisements;

"(9) That said Chapter 185 deprives the Petitioner of its property without due process of law;

"(10) That the Petitioner as the owner and publisher of a newspaper is not in the same classification or category as a public utility and is therefore not subject to governmental control and supervision as to the reasonableness of its advertising rates;

"(11) That the statute is unreasonably regulatory and discriminatory in that it attempts to impose re-

BLEED THROUGH – POOR COPY

strictions on publishers of newspapers or other periodicals or operators of radio stations, and does not regulate or attempt to regulate various and numerous other forms and methods of political advertising, thus creating a privilege for such other advertisers and penalizing publishers of newspapers and radio stations.

"(12) That it is an unwarranted, unjustifiable, illegal and unconstitutional attempt to limit the circulation of information to which the public is entitled."

It is obvious that the petition specifically raised questions under both the United States Constitution and that of the State of New Hampshire. For example, it is made clear by sub-paragraph (3) of paragraph 17 that it was claimed that freedom of the press guaranteed by the Federal constitution was abridged. Similarly sub-paragraph 4 invoked the Federal constitution as well as the State constitution It is true that several of the sub-paragraphs did not specifically state that the constitution of both the State and the United States were violated. However, neither are these sections expressly limited so as to specifically invoke only the State's constitution. Read as a whole, in view of those paragraphs which specifically invoke the guarantees in the U. S. Constitution, it is clear that the petition for a declaratory judgment raised federal questions.

This is not an example of what the appellee characterizes as a "casual citation" lacking "sufficient specification to raise a federal question," citing cases where it was held that the constitutional objections were not specified. It is not a case like *Maxwell* v. *Newbold,* 18 How. 511, 15 L. Ed. 506 (1855) cited by the appellee. The only Federal question raised in the State court in that case was embodied in an objection that:

"The charge of the court, the verdict of the jury and the judgment below, are each against and in conflict

with the Constitution and laws of the United States, and therefore erroneous."

The Supreme Court obviously held this insufficient because:

> "It alleges that the charge of the court was against, and in conflict with, the Constitution and laws of the United States. But what right did he claim under the Constitution of the United States which was denied him by the state court? Under what clause of the Constitution did he make his claim? And what right did he claim under an Act of Congress. And under what Act, in the wide range of our statutes, did he claim it? The record does not show—nor can this court undertake to determine that the question as to the faith and credit due to the record and judicial proceedings in Ohio, was made or determined in the state court, or that that court ever gave any opinion on the question. For aught that appears in the record, some other clause in the Constitution, or some law of Congress may have been relied on, and the mind of the court never called to the clause of the Constitution now assigned as error in this court."

Certainly no such criticism can be made here. The rights allegedly infringed are specified in the petition for a declaratory judgment, being the freedom of contract, freedom of the press, equal protection of the laws, the freedom to contract, the freedom from being deprived of liberty and property without due process of law.

Similarly the citation of *Messenger* v. *Mason*, 10 Wall. 507, 19 L. Ed. 1028 (1870) is not pertinent since the appellant there merely raised the objection that a statute was unconstitutional and void without specifying the reasons therefore and without even identifying the statute drawn in question. The decision in *Herndon* v. *Georgia*, 295 U. S. 441, 55 S. Ct. 794 (1935), insofar as that decision is based on the insufficiency of the specification of the constitutional objections, is similarly distinguishable.

BLEED THROUGH – POOR COPY

B. *The Federal questions raised by the appellant in its petition for a declaratory judgment were recognized and decided by the Supreme Court of New Hampshire.*

As the Supreme Court of New Hampshire stated in its opinion (*The Chronicle & Gazette Publishing Co., Inc.*, v. *Attoreny General, et al.*, 94 N. H. —, 48 A (2) 478, 479):

> "The questions of law raised by the plaintiff's petition were reserved and transferred without ruling by the Court."

The appellant having specified the various Federal questions in its original petition, they were transferred with all other questions of law.

The defendants' brief filed in the State court impliedly recognized that the constitutional questions raised were based on the Federal as well as the State constitution. Nowhere in the brief is it suggested that the argument is limited to questions raised under the State constitution.

The plaintiff's brief in the State court dealt with several questions, including the constitutional ones. The latter were included under Section D, the heading of which was: "Section 2 of Chapter 185, Laws of 1945, is unconstitutional." It is true that in the subsections under Section D, the plaintiff specifically set out certain provisions of the State constitution. This does not alter the fact that it had raised questions under the Federal constitution. If the plaintiff were in a position where it was claiming that the Federal questions were first raised by it in its State court brief, the brief might be ambiguous and inadequate to serve that purpose. The appellant, however, is not in that position. Its position is that the Federal questions were specified and raised in its petition for a declaratory judgment. The ambiguity, if any, in the brief, does not alter that fact.

The Supreme Court of New Hampshire went on to render an opinion which clearly indicated that it was dealing with Federal as well as State constitutional questions. At least the opinion is consistent with that conclusion. The majority opinion does not limit itself to provisions of the State constitution. It cites cases of the United States Supreme Court involving Federal questions.

Again it is true that the mere citation of cases involving Federal questions and the rendering of a decision consistent with a decision based on both Federal and State questions would not be sufficient in itself to show that the appellant has raised Federal questions. However, that is not the appellant's claim. The latter defined the issues, including the Federal ones, in its original petition for a declaratory judgment. They were all transferred to the Supreme Court of New Hampshire. Presumably, therefore, the latter's decision would embrace all the questions. The fact that its opinion is consistent with passing on the Federal questions, although it does not specifically state that Federal constitutional questions are involved and the citation of cases involving Federal questions, when viewed in the light of the fact that Federal questions had been specifically raised previously, indicate that the State Supreme Court was considering the provisions of the Constitution of the United States.

This fact is made quite clear by the dissenting opinion of Chief Justice Marble. In his opinion he not only cited decisions involving the Federal constitution but specifically and decisively indicated that the appellant had raised Federal questions (*Chronicle & Gazette Publishing Co., Inc.*, v. *Attorney General*, — N. H. —, 48 A(2)378, 483):

> "If, however, that legislation bears no substantial relation to a proper legislative purpose or is either arbitrary or discriminatory, it contravenes both the Fifth and the Fourteenth Amendments to the Federal

BLEED THROUGH – POOR COPY

Constitution as well as Articles 2 and 12 of our own Bill of Rights."

Though the mentoin of Federal questions is not alone a sufficient raising of Federal questions, it is significant in the light of the other circumstances of this case. It indicates recognition of the fact that the appellant had raised and presented Federal questions to the State court. The fact that this recognition appears in the dissenting opinion does not detract from its efficacy as some evidence of the fact that the Federal questions were considered. Since the majority opinion is consistent with that conclusion, there can be but little doubt that the Federal questions specifically raised in the original petition for a declaratory judgment, and transferred with all the other questions of law to the New Hampshire Supreme Court, were considered and passed on by that Court in its original decision and opinion.

Subsequently, after the appellant's petition for a rehearing was denied, Chief Justice Marble signed a certificate to the effect that by its original petition Federal questions had been raised by the appellant and decided by the Supreme Court of New Hampshire (see Record p. ——). This certificate was not merely that of Chief Justice Marble but a certificate of the Court signed on its behalf by the Chief Justice. By itself, such a certificate might not be conclusive. But it is entitled to great weight and, in view of the other circumstances outlined previously, it is difficult to understand how one can deny that the Federal questions were raised before and decided by the Supreme Court of New Hampshire.

II. The Appellant Also Properly Raised the Federal Question by Filing a Petition for Rehearing

During the September Term, 1946, of the Supreme Court of New Hampshire, the appellant filed a Motion for Re-

hearing with a Brief in support thereof, again attacking the constitutionality of Chapter 185 of the Session Laws of New Hampshire, raising specifically objections based on clauses of the Constitution of the United States (Record p. ——). On September 3, 1946, the State Court denied the motion.

The appellee has cited *Herndon* v. *Georgia,* 295 U. S. 441, 55 S. Ct. 794, 79 L. Ed. 1530 (1935) to the effect that a petition for rehearing is not effective to raise Federal questions for the first time unless the Court actually entertains the question and decides it.

In *Herndon* v. *Georgia* and the cases cited therein the record merely disclosed a filing of the motion for a rehearing and its dismissal without more. In such a situation obviously it does not affirmatively appear that "the court actually entertains the question and decides it." For all the record shows, the denial of the motion might have been based on some local rule of procedure in those cases which prevented the State Court in question considering the federal questions on their merits.

In the instant case, however, there is an affirmative indication that the questions raised by the motion for a rehearing were entertained on their merits and that the motion was denied because the Court decided the issues adversely to the appellant. These facts are expressly and specifically indicated by the certificate of Chief Justice Marble (Record p. ——), which states that the motion for rehearing raised the specific Federal questions now the subject of this appeal, that these questions were considered on their merits and that they were decided adversely to the appellant.

It should be noted that the certificate is not merely that of Chief Justice Marble but that of the Supreme Court of New Hampshire, Chief Justice Marble signing on its behalf.

BLEED THROUGH – POOR COPY

It should also be noted that there is nothing in the Record inconsistent with what is affirmed in the certificate.

Therefore, *Herndon* v. *Georgia, supra,* is inapplicable, since it definitely appears in this case that the questions raised by the motion were considered on their merits. It would seem to follow, therefore, that even though the Federal question had not been previously raised by the appellant, they were raised by the motion for a rehearing. Cf. *Cincinnati, Portsmouth, Big Sandy and Pomeroy Packet Co.* v. *Bay,* 200 U. S. 179, 50 L. Ed. 428, 26 S. Ct. 208 (1906).

III. Conclusion

In view of the above considerations, as well as those contained in the appellant's Statement of Jurisdiction, it is respectfully submitted that the Federal questions sought to be reviewed were raised by the appellant in the Supreme Court of New Hampshire (a) by its original petition for a declaratory judgment and (b) by its motion for a rehearing.

In view of the additional fact that the Federal questions so raised are substantial ones, for reasons stated in the appellant's Statement of Jurisdiction, it is submitted that the Supreme Court of the United States has jurisdiction to review the decision of the Supreme Court of New Hampshire in the above entitled cause under Section 237 of the Judicial Code, also known as U. S. C. Title 28, Section 344, and that the appellee's motion to dismiss this appeal or to affirm the judgment from which the appeal was taken should be denied.

HUGHES & BURNS,
Counsel for Appellant.

FREE COPY

Office - Supreme Court, U.S.
FILED
DEC 12 1946
CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

No. 780

THE CHRONICLE & GAZETTE PUBLISHING CO., INC.,

Appellant,

vs.

ATTORNEY GENERAL, ET AL.,

Appellees

APPEAL FROM THE SUPREME COURT OF THE STATE OF NEW HAMPSHIRE

STATEMENT OPPOSING JURISDICTION AND MOTION TO DISMISS OR AFFIRM

ERNEST R. D'AMOURS,
Attorney General,
State House,
Concord, N. H.;

GORDON M. TIFFANY,
Law Assistant to the
Attorney General,
Counsel for Appellees.

Robert W. Upton

BLEED THROUGH – POOR COPY

INDEX

Subject Index

	Page
Statement opposing jurisdiction	1
Statement of the case	2
Argument	3
Motion to dismiss or affirm	11

Table of Cases Cited

Adams v. *Lansdon*, 18 Idaho 483, 110 Pac. 280 (1910)	9
Alabama State Federation, etc. v. *McAdory*, 325 U. S. 450, 89 L. Ed. 1725, 65 Sup. Ct. 1384 (1945)	8
Assoc. Press v. *N. L. R. B.*, 301 U. S. 103, 81 L. Ed. 953, 57 Sup. Ct. 650 (1937)	9
Assoc. Press et al. v. *U. S.*, 326 U. S. 1, 89 L. Ed. 2013, 65 Sup. Ct. 1416 (1945)	9
Chronicle & Gazette Pub. Co., Inc. v. *Attorney General*, 94 N. H. —, 48 Atl. 2d 478 (decided June 27, 1946; rehearing denied without opinion September 3, 1946)	2
Cincinnati, Portsmouth, Big Sandy and Pomeroy Packet Co. v. *Bay*, 200 U. S. 179, 50 L. Ed. 428, 26 Sup. Ct. 208 (1906)	6
Commonwealth v. *Evans*, 156 Pa. Super. 321, 40 Atl. 2d 137, 138-139 (1945)	9
Giragi v. *Moore*, 301 U. S. 670, 81 L. Ed. 1334, 57 Sup. St. 945 (1936)	9
Grosjean v. *American Press Co., Inc.*, 297 U. S. 233, 80 L. Ed. 660, 56 Sup. Ct. 444 (1936)	9
Herndon v. *Georgia*, 295 U. S. 441, 442-443, 79 L. Ed. 1530, 55 Sup. Ct. 794 (1935)	5
LaFollette v. *Kohler*, 200 Wis. 518, 228 N. W. 895 (1930)	9
Maxwell v. *Newbold*, 18 How. 511, 516, 15 L. Ed. 506, 508 (1855)	5
Messenger v. *Mason*, 10 Wall. 507, 509, 19 L. Ed. 1028. 1029 (1870)	5

Page

Osborne v. *Clark*, 204 U. S. 565, 51 L. Ed. 619, 27 Sup. Ct. 319 (1907) 6

State v. *Chaplinsky*, 91 N. H. 310, 317, 18 Atl. 2d 754, affd. 315 U. S. 568, 86 L. Ed. 1031, 62 Sup. Ct. 766 .. 9

Williams v. *Kaiser*, 323 U. S. 471, 477, 89 L. Ed. 398, 65 S. Ct. 363 (1945) 4

STATUTES CITED

New Hampshire Public Acts and Joint Resolutions of the Legislature of 1945 and Special Session of 1944, Chapter 185 2

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

No. 780

THE CHRONICLE & GAZETTE PUBLISHING CO., INC.,

Appellant,

vs.

ATTORNEY GENERAL, ET AL.,

Appellees

APPEAL FROM THE SUPREME COURT OF THE STATE OF NEW HAMPSHIRE

APPELLEE'S STATEMENT OPPOSING JURISDICTION

Pursuant to Rule 12, paragraph 3, Rules of the Supreme Court of the United States, comes now the Attorney General of the State of New Hampshire, appellee, in the above entitled case and discloses the following matter making against the jurisdiction of the Supreme Court of the United States, as asserted in a statement of the basis of appellate jurisdiction filed by the appellant on November 4, 1946.

Statement of the Case

Appellant filed a petition for a declaratory judgment requesting the Superior Court, Rockingham County, New Hampshire, April Term, 1946 to adjudge and decree its "rights under and the constitutionality of chapter 185 of the Session Laws of 1945." The questions of law raised by the petition were reserveed and transferred without ruling to the Supreme Court of the state. Case discharged without reference to the Federal Constitution in the majority opinion. *The Chronicle & Gazette Publishing Co., Inc.* v. *Attorney General*, 94 N. H. —, 48 Atl. 2d 378 (Decided, June 27, 1946; Rehearing denied without opinion, September 3, 1946).

Chapter 185 of the Session Laws of 1945, entitled "An Act Relating to Political Advertising," amended chapter 42 of the Revised Laws, and reads:

> "1. Political Advertising. Amend section 6, chapter 42, of the Revised Laws, by striking out said section and inserting in place thereof the following: 6. Political Advertising. No person shall publish, or cause to be published in a newspaper or other periodical any paid matter which is designed or tends to aid, injure or defeat any candidate for public office, or a constitutional amendment, or any other question submitted to the voters, unless the name of the chairman or secretary, or the names of two officers of the political or other organization inserting the same, or the name of some voter who is responsible therefor, with his residence and the street and number thereof, if any, appear in the nature of a signature. Such matter inserted in reading columns shall be marked at the beginning thereof in a distinctive type "Political Advertisement." No person or corporation, within this state, operating a radio station or network of stations shall broadcast any such paid political matter without first announcing the person or committee paying therefor. Any person who violates,

or in any way knowingly aids or abets the violation of, any provision of this section shall be fined not more than one hundred dollars, or imprisoned not more than sixty days.

"2. Maximum Charges for Political Advertising. Amend section 9, chapter 42 of the Revised Laws by striking out said section and inserting in place thereof the following: 9. Payments for Publication. No person or corporation, within the state, publishing a newspaper or other periodical or operating a radio station or network of stations shall receive for political advertising or for political broadcasts, a rate in excess of the rate or rates regularly charged by such person or corporation for commercial advertising or for commercial broadcasts of similar character and classification and no candidate or political committee shall pay for political advertising or broadcasts any rate or charge in excess of such rate or rates regularly charged.

"3. Filing of Rates. Amend chapter 42 of the Revised Laws by inserting after section 9 the following new section: 9-a. Rates to be Filed. Every person or corporation, within this state, publishing a newspaper or other periodical, or operating a radio station or network of stations, shall file with the secretary of state for public inspection a schedule or schedules showing the rates for commercial advertising and commercial broadcasts. Any such schedule may be changed or amended by filing a new or amended schedule with the secretary of state, but such new or amended rates shall not be effective until thirty days after filing.

"4. Takes Effect. This act shall take effect upon its passage. [Approved May 18, 1945]"

The original defendant were the chairmen and secretaries of the Republican and Democratic Committees of the City of Portsmouth, who were responsible for the insertion of certain political advertisements in the appellant's newspaper. Payments were made at rates in excess of the regular com-

mercial rates. Subsequent to the commencement of the action and immediately prior to the transfer of the case to the Supreme Court of New Hampshire, the Attorney General was joined as a party defendant.

I. No Substantial Federal Question Is Presented

A. *It must appear from the record that a federal question was raised.*

> "It is a well established principle of the Court that before we will review a decision of a state court it must affirmatively appear from the record that the federal question was presented to the highest court of the State having jurisdiction and that its decision of the federal question was necessary to its determination of the cause. • • • And where the decision of the state court might have been either on a state ground or on a federal ground and the state ground is sufficient to sustain the judgment, the court will not undertake to review it." *Williams* v. *Kaiser*, 323 U. S. 471, 477, 89 L. Ed. 398, 65 S. Ct. 363 (1945) and cases cited.

B. *No federal question is raised by appellant's original petition.*

We find no reference in the record to any specific part of the Constitution of the United States until after the majority opinion of the state's highest court sustaining the validty of the state statute had been written. Then the question was raised by the presiding justice in his dissent (R. M). It is true that the appellant in its original petition in the Superior Court of Rockingham County made a passing reference to the Federal Constitution when it requested a ruling that:

> "(3) It is an abridgment of the right of freedom of the press guaranteed in Article 22 of the Constitution of the State of New Hampshire and violates the Constitution of the United States;

BLEED THROUGH = POOR COPY

"(4) It is regulatory and discriminatory and thus violative of the equal protection of the laws guaranteed in Article 10 of the Constitution of the State of New Hampshire and Constitution of the United States;" (R. —).

Such a casual citation does not, of course, show that the federal question was raised before the Supreme Court of the State or that the judicial mind of the Court was exercised upon it. A preliminary attack on the ground that it was "in conflict with the Constitution and laws of the United States," or "unconstitutional and void," or, in violation "of the Constitution of the United States," lacks sufficient specification to raise a federal question.

Maxwell v. *Newbold*, 18 How. 511, 516, 15 L. Ed. 506, 508 (1855);

Messenger v. *Mason*, 10 Wall. 507, 509, 19 L. Ed. 1028, 1029 (1870);

Herndon v. *Georgia*, 295 U. S. 441, 442-443, 79 L. Ed. 1530, 55 S. Ct. 794 (1935).

C. *No federal question is raised by the briefs of either party prior to the opinion of the highest Court of the State.*

A careful study of the appellant's brief before the New Hampshire Supreme Court upon transfer of the case does not reveal the slightest indication that it contested the validity of the statute under any part of the Constitution of the United States. On the contrary, three of the four sections of his argument on constitutionality refer specifically to sections of the *state* constitution which he quotes *verbatim*. The same is true in the appellee's brief.

Of course, precedents decided by the United States Supreme Court were cited by both parties, and by the state court as well in its opinion—a fact which the appellant has labored in his Statement of the Basis of Jurisdiction—but

the citation of federal cases is insignificant. Mr. Justice Holmes recognized this principle in *Osborne* v. *Clark*, 204 U. S. 565, 51 L. Ed. 619, 27 S. Ct. 319 (1907). After noting that the discussion of the *Dartmouth College* case (*Dartmouth College* v. *Woodward*, 4 Wheat. 518, 4 L. Ed. 629 [1819]) in the state court could not be taken as an indication that a federal question had been raised, he said:

> "If a case is carried through the state courts upon arguments drawn from the state Constitution alone, the defeated party cannot try his chances here merely by suggested for the first time when he takes his writ of error that the decision is wrong under the Constitution of the United States. * * *" *Osborne* v. *Clark*, *supra*, 569.

D. *Appellant may not raise the federal question at the last moment in a petition for rehearing in order to save his right of appeal.*

Nor can the appellant suggest the federal question for the first time in his petition for rehearing.

> "The long-established general rule is that the attempt to raise a federal question after judgment, upon a petition for rehearing, comes too late unless the court actually entertains the question and decides it." *Herndon* v. *Georgia*, *supra*, 443, and cases cited.

There was no hearing, argument or opinion rendered upon the appellant's petition for rehearing.

Obviously, the appellant desires to avoid the application of this well-settled rule to the present case. It might be successful if the facts here resembled those in *Cincinnati, Portsmouth, Big Sandy and Pomeroy Packet Co.* v. *Bay*, 200 U. S. 179, 50 L. Ed. 428, 26 S. Ct. 208 (1906) which it has cited in paragraph (5) of its Statement of the Basis of Jurisdiction. Then, perhaps, the certificate of the pre-

BLEED THROUGH – POOR COPY

siding justice might supply the evidence which would perfect jurisdiction. However in the *Cincinnati* case, there was no other evidence, no opinion, at any time, by the state court which would be of assistance to the United States Supreme Court in determining whether or not the federal question had been raised.

E. *No federal question is raised in the opinion of the Court.*

From an inspection of the opinion in this case it must be concluded that no federal question was raised or decided. If it had been, it would be in the opinion. So far as it appears from the record only the dissenting opinion, written by the presiding justice who has signed the certificate here in issue, ever raised or made specific reference to the Fifth and Fourteenth Amendments of the Federal Constitution. Upon this set of facts, it is submitted, that the certificate of the presiding justice, while entitled to respect, should not be permitted to preclude the United States Supreme Court from exercising its own authority in determining upon the face of the record whether or not the federal question was presented to or decided by, the Supreme Court of New Hampshire. See, *Charleston Assn.* v. *Alderson,* 324 U. S. 182, 186, footnote 1; rehearing denied 324 U. S. 888 (1945).

While the appellant appeals, technically, from the order of the State Court of September 3, 1946, which reads in its entirety, "Motion for rehearing denied," the substance of his appeal is necessarily based upon the opinion rendered on June 27, 1946. Not once, in the whole opinion is any part of the Constitution of the United States cited, and this is the only available expression of the "judicial mind" of the State Court, to which the United States Supreme Court has been asked to apply the Federal Constitution. Obviously the appeal must be dismissed for want of a properly presented Federal question.

II. The Opinion of the Supreme Court of New Hampshire Proceeds on Such Widely Accepted Doctrines of Constitutional Law as to Foreclose Further Argument.

The principles upon which the opinion is based, namely, presumption of constitutionality of a statute, judicial respect for legislative discretion upon matters of expediency, and the assumption that a state of facts existed which sustains the enactment of the remedial statute, find frequent expression in the opinions of the Supreme Court of the United States. These expressions are found, completely annotated in the late Chief Justice Stone's opinion in *Alabama State Federation, etc.*, v. *McAdory*, 325 U. S. 450, 89 L. Ed. 1725, 65 S. Ct. 1384 (1945).

In the same opinion we find:

> "The Constitution does not oblige a state to regulate or reform all types of associations, or none. It may begin with such as in its judgment most need regulation. * * * *ibid* 472.

This supports the opinion of the Court that it is not necessary for the legislature to exercise its police power over the entire field in which an evil may exist.

Corrupt Practice Acts are patently a legitimate exercise of the police power. Both the number of such statutes (state and federal) now in effect, and also the numerous decisions of the courts sustaining their constitutional validity testify to this fact. Annotation, *Constitutionality of Corrupt Practice Acts*, 69 A.L.R. 377.

It would be a strange interpretation of the law to permit the legislatures to control the amount which a candidate may spend in a political campaign, so as to insure an equal right to be elected—a right which is guaranteed in New Hampshire by Article 11 of the Bill of Rights—and at the same time deny the states the authority to prevent pub-

BLEED THROUGH – POOR COPY

lishers from nullifying the legislation by charging different candidates different advertising rates. Statutes fixing disbursements have been sustained when attacked on constitutional grounds.

Adams v. *Lansdon,* 18 Idaho 483, 110 Pac. 280 (1910)
LaFollette v. *Kohler,* 200 Wis. 518, 228 N. W. 895 (1930)

Freedom of the press, and freedom of contract are not unlimited freedoms which may be abused at the expense of the community. Therefore they fall within the reasonable exercise of the police power.

Giragi v. *Moore,* 301 U. S. 670, 81 L. Ed. 1334, 57 S. Ct. 945 (1936);
Associated Press v. *N.L.R.B.,* 201 U. S. 103 (1937);
Associated Press et al. v. *U. S.,* 326 U. S. 1 (1945);
State v. *Chaplinsky,* 91 N. H. 310, 317, 18 Atl. 2d 754, aff'd. 315 U. S. 568, 86 L. Ed. 1031, 62 S. Ct. 766;
Commonwealth v. *Evans,* (Pa.) 40 Atl. 2d 137, 138-139 (1945).

Appellant emphasizes the case of *Grosjean* v. *American Press Co., Inc.,* 297 U. S. 233, 80 L. Ed. 660, 56 S. Ct. 444 (1936). The analogy is inept. Because of the expressed background found in the *Grosjean* opinion, it cannot be applied to the present circumstances where there is no hostility motivating the enactment of the statute, and where the purpose is not to limit the circulation of information or advertising of newspapers. In the *Grosjean* case the tax was held "bad because, in the light of its history and of its present setting, it is seen to be a deliberate and calculated device in the guise of a tax to limit the circulation of information to which the public is entitled in virtue of its constitutional guaranties." No tax is here involved.

As construed and applied by the Supreme Court of New Hampshire, Chapter 185 of the Session Laws of 1945 is neither arbitrary nor unreasonable. It is a valid, constitutional exercise of the police power of the state, which does not violate the Fourteenth Amendment to the Federal Constitution.

It is submitted that the United States Supreme Court should either dismiss this appeal for want of a properly presented federal question, or affirm for want of a substantial federal question.

Respectfully submitted,

ERNEST R. D'AMOURS,
Attorney General,
State House, Concord, N. H.;
GORDON M. TIFFANY,
Law Assistant to the Attorney General,
Counsel for Appellees.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

No. 780

THE CHRONICLE & GAZETTE PUBLISHING CO., INC.,

Appellant,

vs.

ATTORNEY GENERAL, ET AL.,

Appellees

APPEAL FROM THE SUPREME COURT OF THE STATE OF NEW HAMPSHIRE

MOTION TO DISMISS OR AFFIRM

Now comes the Attorney General of the State of New Hampshire, appellee herein, and moves the Supreme Court of the United States to dismiss with costs the appeal taken herein, to wit, by the Chronicle & Gazette Publishing Co., Inc., appellant, upon the following grounds:

(1) There is no substantial Federal question involved or properly presented.

(2) It is clear that the decision of the Supreme Court of the State of New Hampshire sustaining the constitu-

tionality of the New Hampshire statute is in accordance with the previous decisions of the Supreme Court of the United States, so as to make further argument unnecessary.

In the alternative appellee moves this Court to affirm the judgment from which the appeal in the above entitled cause purports to be taken on the grounds heretofore mentioned in the appellee's motion to dismiss.

ERNEST R. D'AMOURS,
Attorney General,
State House,
Concord, N. H.;

GORDON M. TIFFANY,
Law Assistant to the
Attorney General,
Counsel for Appellees.

(8098)

INDEX.

	Page
Statement of the Matter Involved	2
This Court Has Jurisdiction	4
Reasons Relied Upon for Granting the Appeal	4
Conclusion	10
Certificate of Counsel	10

CITATIONS.

CASES:

Bridges v. *California*, 314 U. S. 252 (1941)	7
Evans v. *Gore*, 253 U. S. 245 (1920)	5
Grosjean v. *American Press Co.*, 297 U. S. 233 (1936)	5-6
Murdock v. *Pennsylvania*, 319 U. S. 105 (1943)	6
Near v. *Minnesota*, 283 U. S. 697 (1931)	6-7
Nebbia v. *New York*, 291 U. S. 502 (1934)	7, 8
Olsen v. *Nebraska*, 313 U. S. 236 (1941)	7
Schneider v. *Irvington*, 308 U. S. 147 (1939)	7

CONSTITUTIONAL PROVISIONS:

Fifth Amendment	1, 2, 5, 8
First Amendment	1, 5, 6, 7
Fourteenth Amendment	1, 2, 4, 5, 7, 8, 9

STATUTES:

Chapter 185 of the New Hampshire Session Laws of 1945	2-3
Section 237 of the Judicial Code of the United States	4

3. The New Hampshire statute violates appellant's rights as guaranteed by the Fifth and Fourteenth Amendments to the Constitution in that it deprives appellant of property without due process of law.

4. The New Hampshire statute violates appellant's rights as guaranteed by the Fourteenth Amendment to the Constitution because it denies appellant the right of equal protection of the law.

Statement of the Matter Involved.

This case involves the constitutionality of a statute of the State of New Hampshire known as "An Act Relating to Political Advertising," Chapter 185 of the Session Laws of 1945. The said Chapter 185 amends Chapter 42 of the Revised Laws of the State of New Hampshire by providing as follows:

> "1. Political Advertising. Amend section 6, chapter 42 of the Revised Laws, by striking out said section and inserting in place thereof the following: 6. Political Advertising. No person shall publish, or cause to be published, in a newspaper or other periodical any paid matter which is designed or tends to aid, injure or defeat any candidate for public office, or a constitutional amendment, or any other question submitted to the voters, unless the name of the chairman or secretary, or the names of two officers of the political or other organization inserting the same, or the name of some voter who is responsible therefor, with his residence and the street and number thereof, if any, appear in the nature of a signature. Such matter inserted in reading columns shall be marked at the beginning thereof in a distinctive type 'Political Advertisement.' No person or corporation, within this state, operating a radio station or network of stations shall broadcast any such paid political matter without first announcing the person or committee paying therefor. Any person who violates, or in any way knowingly aids, or abets the violation of, any provision of this section shall be fined not more than one hundred dollars, or imprisoned not more than sixty days.

BLEED THROUGH – POOR COPY

"2. Maximum Charges for Political Advertising. Amend section 9, chapter 42 of the Revised Laws by striking out said section and inserting in place thereof the following: 9. Payments for Publication. No person or corporation, within the state, publishing a newspaper or other periodical or operating a radio station or network of stations shall receive for political advertising or for political broadcasts, a rate in excess of the rate or rates regularly charged by such person or corporation for commercial advertising or for commercial broadcasts of similar character and classification and no candidate or political committee shall pay for political advertising or broadcasts any rate or charge in excess of such rate or rates regularly charged.

"3. Filing of Rates. Amend chapter 42 of the Revised Laws by inserting after section 9 the following new section: 9-a Rates to be Filed. Every person or corporation, within this state, publishing a newspaper or other periodical, or operating a radio station or network of stations, shall file with the secretary of state for public inspection a schedule or schedules showing the rates for commercial advertising and commercial broadcasts. Any such schedule may be changed or amended by filing a new or amended schedule with the secretary of state, but such new or amended rates shall not be effective until thirty days after filing.

"4. Takes Effect. This act shall take effect upon its passage.

(Approved May 18, 1945.)"

Appellant publishes in Portsmouth, New Hampshire, a aily newspaper, The Herald. It has always been the pol- y of the Herald to charge a higher rate for political ad- ertising than for ordinary commercial advertising.

On October 30, 1945, in connection with the City elections be held at Portsmouth, New Hampshire, the Chairmen nd Secretaries of the Democratic and Republican Commit- e requested The Herald to publish certain political adver- sements in The Herald. The Herald published the politi- al advertisements and charged for them in accordance with s established rates for political advertising.

Appellant then filed a petition for a declaratory judgment requesting the Superior Court, Rockingham County, New Hampshire, April Term, 1946, to adjudge and decree its "rights under and the constitutionality of chapter 185 of the Sessions Laws of 1945." The questions of law raised by appellant's petition were reserved and transferred to the Supreme Court of New Hampshire without ruling on May 8, 1946, by Stephen N. Wheeler, Presiding Judge of the Superior Court.

On June 27, 1946, the Supreme Court of New Hampshire, in a three to two decision, declared Chapter 185 of the Session Laws of 1945 to be constitutional. Appellant filed a Motion for Rehearing in the September Term, 1946, of the Supreme Court of New Hampshire, and, on September 3, 1946, the Supreme Court of New Hampshire denied this motion. In the October Term, 1946, the Chief Justice of the Supreme Court of New Hampshire signed a certificate that appellant had raised Federal questions in its original petition and motion for rehearing by attacking the constitutionality of Chapter 185 on the ground that it violated the freedom of the press and freedom of contract and deprived appellant of its property, without due process of law, in violation of the Fourteenth Amendment to the Constitution and that the Supreme Court of New Hampshire had considered these questions.

Appellant then filed an appeal in this Court. This Court, on January 6, 1947, dismissed the appeal for want of a substantial federal question.

This Court Has Jurisdiction.

This Court has jurisdiction upon appeal to review the decision of the Supreme Court of New Hampshire under Section 237 of the Judicial Code, 28 U. S. C., Sec. 344.

Reasons Relied Upon for Granting the Appeal.

Appellant respectfully submits that this case does present a substantial federal question because the New Hamp-

BLEED THROUGH – POOR COPY

shire statute violates the guaranties of the First, Fifth and Fourteenth Amendments of the Constitution of the United States.

1. The business of newspapers is the gathering and dissemination of information in the form of news, editorial comment and advertising. Newspapers are dependent, in large measure, for the conduct of their business on the revenue from the advertising published therein.

For many years it has been, and now is, substantially if not universally, the custom of the newspapers of the United States, to sell their publications to subscribers and readers at far less than the cost of production, with the result that circulation revenue meets only a portion of the cost which newspapers must incur to perform the function of the press.

In order to sell newspapers in that manner and so as to give the widest dissemination to the information which they offer, it is necessary to depend on advertising revenues to meet the major cost of production. Any factor which affects advertising revenue correspondingly and directly affects the ability of newspapers to serve their readers and to perform their duties and functions to the public.

If a state legislature can regulate the rate a newspaper may charge for its advertising, the legislature can set that rate at any point. The legislature can then use its control over advertising rates to control the press. As said by Mr. Justice Holmes:

> "A power over a man's subsistence amounts to a power over his will." *Evans* v. *Gore*, 253 U. S. 245 (1920) at page 265.

Under the First and Fourteenth Amendments, state legislatures have no power to control the press in this manner.

In *Grosjean* v. *American Press Co.*, 297 U. S. 233 (1936), this Court recognized that the power to control the press is inherent in the exercise of power to control its advertising revenue and held that a Louisiana state tax on advertising appearing in all publications published in that state having a circulation of 20,000 or more copies per week was an unconstitutional restraint on the press. This Court said:

> "It thus operates as a restraint in a double sense. First, its effect is to curtail the amount of revenue realized from advertising, and, second, its direct tendency is to restrict circulation." (297 U. S. at pp. 244-245.)

And, in the present case, regulation of the rate to be charged for political advertising would restrain the press by curtailing its revenue.

This statute does not place a financial burden on all businesses alike. It was designed to curtail the revenue of only two businesses—both important media for disseminating information. Therefore, this case does not come within the well-established rule that the "publisher of a newspaper has no special immunity from the application of general laws." This Court held, in *Murdock* v. *Pennsylvania*, 319 U. S. 105 (1943), that

> "Freedom of press, freedom of speech, freedom of religion are in a preferred position." (319 U. S. at page 115.)

Under that decision, a statute which singles out the press and radio and seeks to control them through controlling important sources of revenue clearly violates the First Amendment.

The New Hampshire statute also restrains the press by laying down a condition precedent to the right to publish political advertising. A publisher has the right to publish whatever political advertising he desires. This statute which lays down conditions under which he must publish such advertising restricts his right in violation of the First Amendment. As was said in *Near* v. *Minnesota*, 283 U. S. 697 (1931) at page 720, if the publisher has a right to publish without previous restraint, that right cannot be deemed to be dependent upon his doing something else, i.e., in this case publishing political advertising at a rate fixed by the legislature. Merely characterizing the publishing of a newspaper as a business does not permit an invasion of the constitutional immunity against restraint. *Near* v. *Minne-*

BLEED THROUGH – POOR COPY

sota, supra, at page 720. The decision of the New Hampshire Supreme Court is in direct conflict with the rule.

The New Hampshire statute differs from the price fixing statutes sustained by this Court in *Nebbia* v. *New York,* 291 U. S. 502 (1934), and *Olsen* v. *Nebraska,* 313 U. S. 236 (1941), in that its effect is to restrain and regulate the press. Here the state's police power must be weighed against the liberties secured by the First and Fourteenth Amendments. As this Court said in *Schneider* v. *Irvington,* 308 U. S. 147 (1939):

> "Although a municipality may enact regulations in the interest of the public safety, health, welfare or convenience, these may not abridge the individual liberties secured by the Constitution to those who wish to speak, write, print or circulate information or opinion." (308 U. S. at page 160.)

And, as this Court further stated in *Bridges* v. *California,* 314 U. S. 252 (1941):

> "Moreover, the likelihood, however great, that a substantial evil will result cannot alone justify a restriction upon freedom of speech or the press. The evil itself must be 'substantial,' Brandeis, J., concurring in Whitney v. California, supra (274 U. S. 374, 71 L. ed. 1105, 47 S. Ct. 641); it must be 'serious,' id. 376. And even the expression of 'legislative preferences or beliefs' cannot transform minor matters of public inconvenience or annoyance into substantive evils of sufficient weight to warrant the curtailment of liberty of expression. Schneider v. Irvington, 308 U. S. 147, 161, 84 L. ed. 155, 164, 60 S. Ct. 146.
>
> "* * * For the First Amendment does not speak equivocally. It prohibits any law 'abridging the freedom of speech or of the press.' It must be taken as a command of the broadest scope that explicit language, read in the context of a liberty-loving society, will allow." (314 U. S. at pages 262-263.)

The statute in question was designed to secure free and equal elections in New Hampshire. There was no showing, however, that the unregulated use of political advertise-

ments in newspapers and on the radio constituted a substantial threat to free and honest elections that would justify the legislature in restraining the press. This curtailment of freedom of the press was unwarranted and the statute should be declared unconstitutional.

2. The New Hampshire statute impairs appellant's right of freedom of contract and deprives appellant of property without due process of law in violation of the Fifth and Fourteenth Amendments. It does not meet the test laid down in *Nebbia* v. *New York, supra,* in which this Court stated that:

> "* * * the guaranty of due process, * * *, demands only that the law shall not be unreasonable, arbitrary or capricious, and that the means selected shall have a real and substantial relation to the object sought to be attained." (291 U. S. at page 525.)

First, the New Hampshire Legislature, in establishing the maximum rate for political advertising at a rate not in excess of that charged for commercial advertising of similar character and classification, failed to consider that the cost factors entering into the fixing of prices for advertising are entirely different in political advertising than in commercial. Therefore, as Chief Justice Marble of the New Hampshire Supreme Court said in his dissenting opinion (in which Justice Johnston concurred) "the statute must be held invalid because of its arbitrary features." Chief Justice Marble further stated:

> "Judicial notice may properly be taken of the fact that political advertising, though extensive, is temporary. Moreover, the statute affords no protection to publishers of political advertisements against liability for libelous statements contained therein (see *Commonwealth* v. *Company,* 249 Mass. 477, 482), and the editorial scrutiny of 'copy' submitted by a candidate for office, in order to insure its freedom from defamatory matter, may entail more labor than that required in the case of ordinary commercial advertisements.

BLEED THROUGH – POOR COPY

"The statute prescribes no method for determining whether the commercial rate it arbitrarily fixes as adequate for the service rendered political advertisers is reasonable. There is no presumption that it is. *Sharon Herald Co.* v. *County*, 132 Pa. Superior Ct. 245, 251. See *Commonwealth* v. *Company, supra.*"

(The majority opinion and dissenting opinion of the New Hampshire Supreme Court appear on pages 14-22 of Appellant's Statement As to Jurisdiction.)

Secondly, the "means selected" does not have "a real and substantial relation to the object sought to be attained." The object sought to be attained by the New Hampshire Legislature was free and equal elections. Regulation of the rate a newspaper may charge for political advertising is not a reasonable method of obtaining this objective.

3. The New Hampshire statute violates appellant's rights as guaranteed by the Fourteenth Amendment because it denies appellant the right of equal protection of the law. It regulates the rates for political advertising that may be charged by newspapers and radio stations but does not regulate the rates to be charged by other media of advertising. Under the Fourteenth Amendment, a state may resort to classification for the purposes of legislation but the classification must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike. The classification here is arbitrary for other media, such as billboards, posters, and direct mail, are widely used for political advertising. There is no reasonable basis for assuming that newspapers and radio stations alone may charge excessive rates for political advertising or may discriminate against certain candidates. Moreover, this classification clearly has no relation to the object of the legislation—fair and equal elections. The classification is so arbitrary and unreasonable that the statute denies appellant the equal protection of the laws guaranteed by the Fourteenth Amendment to the Constitution.

CONCLUSION.

For the foregoing reasons it is respectfully urged
this petition for a rehearing be granted and that the ju
ment of the Supreme Court of New Hampshire be rever

Respectfully submitted,

ELISHA HANSON,
729 Fifteenth Street, N.
Washington 5, D. C.

STANLEY M. BURNS,
Strafford Bank Building
Dover, New Hampshire,
Attorneys for Appella

LETITIA ARMISTEAD,
729 Fifteenth Street, N. W.,
Washington 5, D. C.
Of Counsel.

Certificate of Counsel.

I, Elisha Hanson, attorney for the appellant, do he
certify that the foregoing petition for a rehearing of
cause is presented in good faith and not for delay.

No. 780. CHRONICLE & GAZETTE PUBLISHING CO., INC. *v.* ATTORNEY GENERAL OF NEW HAMPSHIRE ET AL. Appeal from the Supreme Court of New Hampshire. January 6, 1947. *Per Curiam:* The motion to dismiss is granted, and the appeal is dismissed for the want of a substantial federal question. (1) *Nebbia* v. *New York*, 291 U. S. 502; *Olsen* v. *Nebraska*, 313 U. S. 236. (2) *Associated Press* v. *Labor Board*, 301 U. S. 103; *Associated Press* v. *United States*, 326 U. S. 1. MR. JUSTICE DOUGLAS, MR. JUSTICE MURPHY, and MR. JUSTICE RUTLEDGE are of the opinion that probable jurisdiction should be noted. *Stanley M. Burns* and *Elisha Hanson* for appellant. *Robert W. Upton* for appellees. Reported below: 94 N. H. 148, 48 A. 2d 478.